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5 UNITED STATES DISTRICT COURT  
6 DISTRICT OF NEVADA  
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9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 v.

12 HEIDI HAISCHER,

13 Defendant.

Case No. 2:11-cr-00267-MMD-CWH

ORDER

(Plf.'s Motion in Limine – dkt. no. 58)

14 **I. SUMMARY**

15 Before the Court is Plaintiff United States of America's Motion in Limine (dkt. no.  
16 58). For the reasons set forth below, the Motion is denied.

17 **II. BACKGROUND**

18 The relevant background is summarized in this Court's October 24, 2012, Order.  
19 (See dkt. no. 81 at 1-2.) The Court scheduled an evidentiary hearing for November 5,  
20 2012, on whether Defendant Heidi Haischer may admit evidence of duress at trial. At  
21 the hearing, the parties questioned two witnesses, Heidi Haischer's twin sister Penny,  
22 and Doris Jean Mitchell, and counsel made their respective arguments concerning  
23 admissibility.

24 **III. LEGAL STANDARD**

25 A motion in limine is a request for the court's guidance concerning an evidentiary  
26 question. See *Wilson v. Williams*, 182 F.3d 562, 570 (7th Cir. 1999). Judges have  
27 broad discretion when ruling on motions in limine. See *Jenkins v. Chrysler Motors Corp.*,  
28 316 F.3d 663, 664 (7th Cir. 2002). However, a motion in limine should not be used to

1 resolve factual disputes or weigh evidence. See *C & E Servs., Inc., v. Ashland, Inc.*, 539  
2 F. Supp. 2d 316, 323 (D.D.C. 2008). To exclude evidence on a motion in limine, “the  
3 evidence must be inadmissible on all potential grounds.” See, e.g., *Ind. Ins. Co. v. Gen.  
4 Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004). “Unless evidence meets this high  
5 standard, evidentiary rulings should be deferred until trial so that questions of  
6 foundation, relevancy and potential prejudice may be resolved in proper context.”  
7 *Hawthorne Partners v. AT & T Tech., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). This  
8 is because although rulings on motions in limine may save “time, costs, effort and  
9 preparation, a court is almost always better situated during the actual trial to assess the  
10 value and utility of evidence.” *Wilkins v. Kmart Corp.*, 487 F. Supp. 2d 1216, 1219 (D.  
11 Kan. 2007).

12 In limine rulings are provisional. Such “rulings are not binding on the trial judge  
13 [who] may always change his mind during the course of a trial.” *Ohler v. United States*,  
14 529 U.S. 753, 758 n. 3 (2000); accord *Luce*, 469 U.S. at 41 (noting that in limine rulings  
15 are always subject to change, especially if the evidence unfolds in an unanticipated  
16 manner). “Denial of a motion in limine does not necessarily mean that all evidence  
17 contemplated by the motion will be admitted to trial. Denial merely means that without  
18 the context of trial, the court is unable to determine whether the evidence in question  
19 should be excluded.” *Ind. Ins. Co.*, 326 F. Supp. 2d at 846.

#### 20 **IV. DISCUSSION**

21 A district court may require a criminal defendant to make a pretrial offer of proof to  
22 demonstrate that the evidence in support of an affirmative defense, including duress, is  
23 sufficient as a matter of law to satisfy the elements of the defense. See *United States v.*  
24 *Mack*, 164 F.3d 467, 474 (9th Cir. 1999) (defenses of public authority and entrapment by  
25 estoppel ruled inadmissible prior to trial); *United States v. Brebner*, 951 F.2d 1017, 1027  
26 (9th Cir. 1991) (entrapment by estoppel); *United States v. Dorrell*, 758 F.2d 427, 430-34  
27 (9th Cir. 1985) (necessity). If the defendant fails to present sufficient evidence, the  
28 district court may preclude the defendant from presenting the defense at trial, as well any

1 evidence supporting the defense. See *United States v. Moreno*, 102 F.3d 994, 997-99  
2 (9th Cir. 1996) (holding that evidence related to an affirmative defense is not admissible  
3 if the defendant fails to make a prima facie case of the defense).

4 In order to present a duress defense, a defendant must establish (1) an  
5 immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat  
6 will be carried out, and (3) lack of a reasonable opportunity to escape the threatened  
7 harm. See *Moreno*, 102 F.3d at 997 (9th Cir. 1996). The Ninth Circuit has “long held  
8 that a defendant is not entitled to present a duress defense to the jury unless the  
9 defendant has made a prima facie showing of duress in a pre-trial offer of proof.” *United*  
10 *States v. Vasquez-Landaver*, 527 F.3d 798, 802 (9th Cir. 2008). This rule is intended to  
11 prevent a criminal defendant from presenting irrelevant testimony. *Id.* (quoting *Moreno*,  
12 102 F.3d at 999).

13 Evaluating the availability of a duress defense in cases involving domestic abuse  
14 requires the Court to consider what an immediate threat is, what constitutes well-  
15 grounded fears, and what a “reasonable opportunity to escape” might be. Ninth Circuit  
16 precedent provides this Court with guideposts as to the application of the duress  
17 defense to the facts of Haischer’s case. The Ninth Circuit’s decision in *United States v.*  
18 *Johnson* concerned the admissibility of testimony on the issue of battered women’s  
19 syndrome for admission in the sentencing phase of a trial of various female defendants  
20 who were repeatedly physically abused by a kingpin of a large criminal operation. 956  
21 F.2d 894, 898-99 (9th Cir. 1992) *superseded by regulation on other grounds as*  
22 *recognized in United States v. Martinez-Martinez*, 369 F.3d 1076, 1089-90 (9th Cir.  
23 2004)). “[F]or a substantial period of time a brutal man may subject women to severe  
24 psychological stress such that they ‘failed to escape or cry out for help when in a public  
25 place because they lacked sufficient ego strength, self-confidence and willpower when  
26 they were in the threatening shadow of [the man's] complete domination over them.’” *Id.*  
27 at 900 (quoting *United States v. Winters*, 729 F.2d 602, 605 (9th Cir. 1984)).  
28 “Accordingly, what is required is for the fact-finder to determine whether, given the

1 experience and psychological makeup of this defendant, she feared to leave her criminal  
2 ways and obeyed from fear the criminal who directed her conduct.” *Id.*

3 Similarly, the Ninth Circuit reached the same conclusion when tasked with  
4 determining whether coercion or duress existed, as required for a conviction under 18  
5 U.S.C. § 2261(a)(2), the criminal interstate domestic violence statute. It held that  
6 “whether the victim was subject to coercion or duress or had a reasonable opportunity to  
7 escape must be evaluated from the perspective of a reasonable person in the victim's  
8 position, considering all of the circumstances, including the victim's gender.” *United*  
9 *States v. Dowd*, 417 F.3d 1080, 1088-89 (9th Cir. 2005) (analogizing to duress defense  
10 when discussing requirement of force, duress, or fraud in interstate domestic violence  
11 crime). Consequently, the standard the Court uses to evaluate whether Haischer has  
12 met her burden pre-trial must take into account the particular circumstances faced by  
13 Haischer—including her gender, occupation, and relationship with Nunes.

14 With this contextualized analysis in mind, the court in *United States v. Ceballos*,  
15 593 F. Supp. 2d 1054, 1061-62 (S.D. Iowa 2009) applied the Ninth Circuit's domestic  
16 violence guidelines in *Johnson* to rule in favor of admitting evidence of duress. The  
17 Court explained that “while [the abuser's] general threat to hit Defendant would not  
18 ordinarily suffice as a well grounded fear of death or serious bodily injury, the context of  
19 the threat combined with the history of severe domestic violence provides the requisite  
20 objective fear.” *Id.* at 1061. This suggests that the particular nature of an abusive  
21 relationship establishes a well grounded threat even if a particular threat on any  
22 particular occasion might not ordinarily be enough for a coercion or duress defense. The  
23 court went on to discuss how it could not, as a matter of law, preclude the defendant  
24 from offering domestic violence evidence on the grounds that the victim could have  
25 refused to engage in the illegal activity or ended the relationship:

26 The Government attempts to counter by arguing it was at least negligent or  
27 reckless for Defendant to remain with Defendant after his first request for  
28 her to translate, which would preclude a duress defense for Defendant's  
second translation a week later. However, the Court cannot conclude this  
as a matter of law because of [the abuser's] ongoing threat of violence

1 should Defendant refuse his requests or attempt to leave. In fact, it is the  
2 Court's experience, as borne out by this case, that the most dangerous  
3 time for a victim is often immediately following a separation from the  
4 abuser.

5 *Id.* at 1063.

6 In light of the standard, the Court holds that Haischer has made a facial showing  
7 of duress based on the evidence offered at the November 5, 2012, hearing. The first  
8 two elements of duress were met: enough evidence exists in the record and in the  
9 testimony of the two witnesses to demonstrate that Haischer was in an abusive  
10 relationship, and that the threat of harm was immediate. Penny Haischer testified that  
11 Heidi Haischer was being abused in connection with signing of loan documents in early  
12 January 2007. Though the government points out that these documents were not the  
13 original loan documents signed in December 2006, the fact that Penny Haischer's  
14 testimony describes threats of abuse in connection with mortgage dealings generally is  
15 enough to sustain a prima facie showing of duress. In addition, the reported instances of  
16 domestic violence, Nunes' prior history of abuse, and Penny Haischer's testimony  
17 concerning the incident in January 2007 suffice to make a facial showing that the threat  
18 of harm was well-founded.


19 While the third duress requirement is a closer call, the particular nature of  
20 domestic abuse cases counsel toward a finding that the jury could reasonably conclude  
21 that Haischer lacked a reasonable opportunity to escape. The testimony demonstrates  
22 that the abusive relationship between Nunes and Haischer spanned several years, and  
23 was marked by highs and lows in the couple's relationship together. "[W]hat is required  
24 is for the *fact-finder* to determine whether, given the experience and psychological  
25 makeup of this defendant, she feared to leave her criminal ways and obeyed from fear of  
26 the criminal who directed her conduct." *Johnson*, 956 F.2d at 900 (noting that "in other  
27 contexts, too, we have recognized the pattern, all too familiar, of a victim identifying with  
28 the aggressor under conditions of terror.") (Emphasis added). Given the close nature of

1 the pre-trial proffer on this point, the Court will not stand in the way of the jury's  
2 responsibility to determine whether such duress actually occurred.

3 **V. CONCLUSION**

4 Accordingly, IT IS ORDERED that Plaintiff United States of America's Motion in  
5 Limine to Exclude Evidence of Duress (dkt. no. 58) is DENIED.

6 DATED THIS 6<sup>th</sup> day of November 2012.

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10 MIRANDA M. DU  
11 UNITED STATES DISTRICT JUDGE  
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